

HOMOSEXUALS' RIGHT TO MARRY: A CONSTITUTIONAL TEST AND A LEGISLATIVE SOLUTION¹

American history furnishes numerous examples of individual and minority struggles to secure the "Blessings of Liberty." The success of these endeavors frequently depends upon society's prevailing mores and attitudes toward those seeking what they deem their fundamental rights. The courts often become the ultimate arbiters of these disputes, and they too are undoubtedly influenced by the majority's current prejudices. One such dispute has centered on marriage between homosexuals.¹

The question of the constitutionality of state prohibitions of same-sex marriage first reached the courts in the early 1970s. Homosexual couples were repeatedly denied the opportunity enjoyed by heterosexuals to legitimate their relationships and obtain marital benefits.² This Comment will explore the inadequacy of the judiciary's response to the issue of same-sex marriage by comparing the courts' reaction to this problem with decisions involving similar constitutional considerations. Using an equal protection analysis, the Comment argues that homosexual couples involved in exclusive, long-term relationships are similarly situated to committed heterosexual couples and that a "middle level" of judicial scrutiny should be applied to classifications based on sexual preference. Examination of marriage restrictions leads to the conclusion that they are unconstitutional: the states must afford homosexuals the opportunity to make a marriage commitment. Finally, quasi-marital status is proposed as a mechanism for fulfilling the state's duty to provide marital benefits and legal status to homosexual couples.

I. THE CASE LAW³

Regulation of marriage has traditionally been the province of state governments rather than the federal judiciary.⁴ Although

¹ The term "homosexual," unless otherwise specified, will be used in this Comment to refer to both men and women.

² *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

³ For a comprehensive review of recent decisions affecting homosexuals' professional and social status, see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

⁴ See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Cleveland v. United States*, 146 F.2d 730, 733 (10th Cir.

most state statutes do not explicitly prohibit same-sex marriage,⁵ state courts have interpreted them to preclude the possibility of a valid homosexual marriage. All courts faced with this issue have relied on the premise that a lawful marriage, by definition, can be entered into only by two persons of opposite sex.⁶ No court has taken the position that state prohibition of homosexual marriage is unconstitutional.

Cases involving same-sex marriages have been litigated in two contexts—dissolution of same-sex unions and denial of marriage licenses to homosexual couples. Illustrative of the first category are “marriages” between two parties of the same sex, one of whom misrepresented his gender. In *Anonymous v. Anonymous*,⁷ for example, the Supreme Court of Queens County, New York, held that a marriage between two males was a nullity, notwithstanding the husband’s belief that the wife was a female at the time of the ceremony and her subsequent operation to have her male organs removed. The court reasoned that although New York law⁸ has no provision regarding same-sex marriage the traditional definition of marriage as a union between man and woman is implicit in the statute. The ceremony in which plaintiff and defendant participated therefore did not create a marriage contract “in fact or in law.”⁹ Such reliance on conventional notions of marriage typifies the reasoning of courts confronted with previously solemnized homosexual unions.¹⁰

1945), *aff’d*, 329 U.S. 14 (1946); *Stevens v. United States*, 146 F.2d 120, 123 (10th Cir. 1944); *Klein v. Mayo*, 367 F. Supp. 583, 585 (D. Mass. 1973), *aff’d mem.*, 416 U.S. 953 (1974); *O’Neill v. Dent*, 364 F. Supp. 565, 568 n.6 (E.D. N.Y. 1973).

⁵ The Texas statute is unusual in providing that, “[a] license may not be issued for the marriage of persons of the same sex.” TEXAS FAM. CODE ANN. tit. 1, § 1.01 (Vernon 1975).

⁶ See *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976); *B. v. B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

⁷ 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

⁸ N.Y. DOM. REL. LAW § 5-25 (McKinney 1977).

⁹ *Anonymous v. Anonymous*, 67 Misc. 2d 982, 985, 325 N.Y.S.2d 499, 501 (Sup. Ct. 1971). Interestingly, the court rested its decision upon the New York statute’s silence regarding same-sex marriages, although it could have relied on the wording of the statute itself. N.Y. DOM. REL. LAW § 7 (McKinney 1977) provides that a marriage in which consent has been obtained by “reason of force, duress or fraud” is “void from the time its nullity is declared by a court of competent jurisdiction” (emphasis supplied).

¹⁰ *M.T. v. J.T.*, 140 N.J. Super. 77, 84-85, 355 A.2d 204, 207-08, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976) (while holding that male undergoing successful

The second category of same-sex marriage cases involves judicial confirmation of a state's refusal to issue a marriage license to homosexual couple. In *Baker v. Nelson*,¹¹ the Minnesota Supreme Court became the first state supreme court called upon to legitimate a same-sex marriage. The court first dismissed the petitioners' contention that the absence of an express prohibition in the state statutes¹² evinced a legislative intent to permit homosexual marriages. As in *Anonymous v. Anonymous*,¹³ the court relied on the traditional definition of marriage as a contract between a man and a woman.¹⁴ The court also denied that the petitioners were deprived of a fundamental right or subjected to irrational or invidious discrimination and thus disposed of the argument that state recognition of homosexual marriage is constitutionally compelled.¹⁵

The outcome of *Baker* was followed in *Singer v. Hara*¹⁶ and *Jones v. Hallahan*,¹⁷ cases also involving homosexual couples seeking marriage licenses.¹⁸ In *Jones*, the Kentucky Court of Appeals denied a license to a lesbian couple. Relying exclusively on the traditional definition of marriage,¹⁹ the court refused to consider the petitioners' constitutional arguments.

transsexual operation is thereafter considered female for marital purposes, court notes in dictum that statute impliedly requires that marriage partners be members of opposite sex); *B. v. B.*, 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974) (transsexual husband may not counterclaim for divorce in annulment suit because valid marriage could not be contracted between woman and partner lacking male sex organs).

¹¹ 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

¹² MINN. STAT. ANN. §§ 517.01-.08 (West 1969). MINN. STAT. ANN. § 517.01 (West Supp. 1978) now defines marriage as a contract between a man and a woman.

¹³ 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

¹⁴ *Baker v. Nelson*, 291 Minn. 310, 311, 191 N.W.2d 185, 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

¹⁵ *Id.* at 313-15, 191 N.W.2d at 186-87. The holding in *Baker* governed the Eighth Circuit's decision when the same couple brought suit to obtain increased educational benefits from the Veterans Administration on the ground that they were married. Plaintiffs were collaterally estopped from relitigating the issue of marriage *vel non*. *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976).

¹⁶ 11 Wash. App. 247, 522 P.2d 1187 (1974).

¹⁷ 501 S.W.2d 588 (Ky. 1973).

¹⁸ Another such case, *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wis. 1972), was disposed of on a procedural issue before the court reached the substantive question.

¹⁹ Because the Kentucky statutes did not define marriage, the court turned to common usage and quoted several dictionary definitions, which designated marriage as a relationship between one man and one woman. 581 S.W.2d 588, 588 (Ky. 1973).

The *Singer* court, after disposing of a claim that the statute allowed same-sex marriage,²⁰ discussed extensively the equal protection issue, as well as the impact of Washington's equal rights amendment.²¹ The court held that restriction of marriage to heterosexual couples was not a gender-based classification demanding close judicial scrutiny.²² A low level of scrutiny was applied, and the traditional view of marriage justified as bearing a rational relationship to the policy of "affording a favorable environment for the growth of children."²³ Nor did plaintiffs prevail on the theory that they were deprived of a fundamental right, the right of marriage. Marriage, held the court, refers to a male-female union. Therefore, "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."²⁴

The judiciary has unanimously inferred prohibitions of same-sex marriage from silent state statutes. The state courts have failed entirely to question their assumption that the concept of marriage on which they rely so heavily is constitutionally acceptable. The perceived incompatibility of marriage and homosexuality arises out of outmoded biases, which should not be allowed to justify denial of the legal, financial, and social benefits of marital status. The following section is an attempt to rebut these attitudes by detailing the similarities between heterosexual and homosexual relationships.

²⁰ WASH. REV. CODE ANN. § 26.04.010 (West Supp. 1979) provides: "Marriage is a civil contract which may be entered into by *persons* of the age of eighteen years, who are otherwise capable . . ." (emphasis supplied). Petitioners argued that the legislature, by designating "persons of the age of eighteen years" rather than "males and females," intended to permit same-sex marriages. The court rejected this argument, pointing to WASH. REV. CODE ANN. § 26.04.210 (West Supp. 1979). That section, which relates to the affidavits required for issuance of a marriage license, refers to "the male" and "the female," thereby refuting the suggestion that the legislature intended to allow same-sex marriages. 11 Wash. App. 247, 249-50, 522 P.2d 1187, 1189 (1974).

²¹ WASH. CONST. art. 31, § 1. The court held that Washington's equal rights amendment neither prohibits all legal differentiation between males and females nor creates any new rights or responsibilities, such as the right of persons of the same sex to marry. 11 Wash. App. 247, 258-60, 522 P.2d 1187, 1194-95 (1974). For a discussion of the potential effect of a federal equal rights amendment on the recognition of homosexual marriage, see Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) [hereinafter cited as *The Legality of Homosexual Marriage*].

²² *Singer v. Hara*, 11 Wash. App. 247, 258-59, 522 P.2d 1187, 1194-95 (1974).

²³ *Id.* at 264, 522 P.2d at 1197.

²⁴ *Id.* at 261, 522 P.2d at 1196.

II. THE EQUAL PROTECTION CLAUSE AS A BASIS FOR HOMOSEXUALS' RIGHT TO MARRY

A. Comparing Heterosexual and Homosexual Couples

The gay community in America is more couple-oriented than many heterosexuals realize. Pervasive homosexual involvement in exclusive relationships²⁵ undermines the popular notion that homosexuals are usually promiscuous.²⁶ Moreover, a great deal of evidence suggests that intense homosexual relationships are often long-lasting.²⁷

The ingredients of a successful homosexual relationship are virtually identical to those of a comparable heterosexual relationship.²⁸ Both are characterized by the partners' long-term affection for each other and by their abilities to compromise and deal with

²⁵ See P. FISHER, *THE GAY MYSTIQUE* 210-12 (2d ed. 1975); C. WARREN, *IDENTITY AND COMMUNITY IN THE GAY WORLD* 71 (1974); George, *Marriage Counseling for Gay Couples*, 2 *NEW GAY LIFE*, Feb. 1978, at 23.

²⁶ Those homosexuals who do frequently change sex partners often view their own promiscuity as "a hopefully temporary transitional stage in which they more or less systematically search for the 'right' partner with whom they can have a lasting relationship." C. TRIPP, *THE HOMOSEXUAL MATRIX* 145 (1975).

Another recent study found that, although some homosexuals frequently change sex partners,

a relatively steady relationship with a love partner is a very meaningful event in the life of a homosexual man or woman The fact that they generally went on to a subsequent affair with another partner seems to suggest a parallel with heterosexuals' remarriage after divorce rather than any particular emotional immaturity or maladjustment.

A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 102 (1978).

²⁷ See Hooker, *The Homosexual Community*, in *THE SAME SEX* 37 (R. Weltge ed. 1969).

The results of a study of the lesbian community in Philadelphia between 1964 and 1970 manifest a high rate of long-term alliances; among the lesbians surveyed, 64 of 65 indicated a preference for such relationships, 75% had had two or fewer such relationships, and 71% had had one such arrangement. Hedblom, *The Female Homosexual: Social and Attitudinal Dimensions*, in *THE HOMOSEXUAL DIALECTIC* 48-49 (J. McCaffrey ed. 1972).

²⁸ In one signal respect, of course, same-sex unions differ from heterosexual marriage: no homosexual couple has the capacity for procreation. Discussion of this distinction appears in the text accompanying notes 126-29 *infra*, where protection of marriage as a reproductive unit is treated as a state interest asserted in support of marriage restrictions. The difference in reproductive capability is not germane to comparison of homo- and heterosexual marriages because courts have not regarded the ability to reproduce as part of the definition of marriage. In *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976), for example, the court upheld a marriage solemnized after the wife's successful sex-reassignment operation, despite the fact that transsexuals are sterile. See generally Veitch, *The Essence of Marriage—A Comment on the Homosexual Challenge*, 5 *ANGLO-AM. L. REV.* 41 (1976).

conflicts as they arise.²⁹ According to Dr. C. A. Tripp, a prominent psychologist and student of homosexuality,

homosexual and heterosexual bonds share a host of commonalities. . . . In particular, the settled-in qualities of the homosexual couple tend to be precisely those which characterize the stable heterosexual relationship. The similarities evidenced in daily life are especially noticeable. The way the partners interact as they engage in conversation, the way casual affection is expressed and minor irritations are dealt with, as well as how visitors are treated, or dinner is served, and myriad other details of everyday life are all more or less indistinguishable. Viewed from this angle, there are clearly more differences between individuals and individual couples than there are between kinds of couples.³⁰

Moreover, the commitment many homosexuals have made to their mates is of a magnitude comparable to the bond between husband and wife. A successful long-term homosexual relationship may be even stronger than that of a heterosexual couple: while society smiles upon heterosexual marriage, a successful homosexual couple maintains unity in the face of society's disapproval.³¹

The studies cited above indicate that the emotional component of a successful long-term homosexual relationship is essentially the same as that of a successful long-term heterosexual relationship. Yet the states persists in a traditional view of marriage that grants legitimacy to heterosexual couples while withholding it from homosexuals. Significant disabilities result from homosexuals' incapacity to legitimate their unions. They are deprived of all federal and state marital privileges: joint tax returns³² and dependency deductions;³³ gift and estate tax benefits;³⁴ wrongful-death recovery;³⁵

²⁹ See George, *supra* note 25, at 23.

³⁰ C. TRIPP, *supra* note 26, at 159.

³¹ For example, homosexuals who decide to live together face more hurdles than a heterosexual couple. Realtors may be reluctant to rent, families may discourage the alliance, neighbors may be hostile or unfriendly, and for some homosexuals the fear of discovery at work is overwhelming. See P. FISHER, *supra* note 25, at 212; George, *supra* note 25, at 23.

³² I.R.C. § 6013(a). Because marital status is defined under state and not federal law, the Internal Revenue Service must, as a rule, accept the state's definition of marriage. *E.g.*, Rev. Rul. 58-66, 1958-1 C.B. 60.

³³ *Id.* § 213. For a discussion of homosexual couples' problems under the Internal Revenue Code, see *The Legality of Homosexual Marriage*, *supra* note 21, at 579 n.28 (1973).

³⁴ *E.g.*, I.R.C. §§ 2056, 2513, 2523.

³⁵ *E.g.*, 42 PA. CONS. STAT. ANN. § 8301 (Purdon Supp. 1979).

Federal Old-Age, Survivors, and Disability Insurance benefits,³⁶ granted on the basis of an existing or previous marriage;³⁷ intestate inheritance;³⁸ community property rights;³⁹ state-enforced support obligations;⁴⁰ and other benefits.⁴¹ More fundamentally, same-sex couples are denied the additional sense of worth that comes with acceptance by the community.⁴²

Because of the similarity between heterosexual and homosexual couples, the distinctions presently drawn between the two must be examined to see if they can withstand equal protection analysis.

The remainder of this section considers equal protection jurisprudence as it applies to the issue of homosexual marriage. The most familiar doctrines appear to support state prohibitions of homosexual marriage. In the last few years, however, the Supreme Court has begun to move away from the rigidities of the old doctrines. This development offers some hope for equality of marital opportunity.

B. *The Appropriate Degree of Judicial Scrutiny*

The Supreme Court began to use the equal protection clause of the fourteenth amendment as a major interventionist tool during the 1960s. At that time it developed a "two-tiered" approach, which revolutionized fourteenth amendment challenges to legislative enactments.⁴³ If the legislation in question denigrated a

³⁶ 42 U.S.C. §§ 401-432 (1976).

³⁷ See *Califano v. Goldfarb*, 430 U.S. 199 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (surviving parent, regardless of gender, entitled to insurance benefits).

³⁸ E.g., 20 PA. CONS. STAT. ANN. §§ 2101-2110 (Purdon Supp. 1979).

³⁹ E.g., CAL. PROB. CODE §§ 201-206 (West 1956 & Supp. 1979).

⁴⁰ E.g., N.J. STAT. ANN. §§ 44:1-143 (West Supp. 1979) (enforceable support obligation of husband).

⁴¹ In *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976), for example, the court affirmed the dismissal of a homosexual's complaint, which sought an increase in Veterans Administration educational benefits on the ground that he had a "dependent spouse."

⁴² Withholding the right to marry has been a mechanism of oppression in other sectors of our society. In the antebellum South, slaves were not permitted to marry. K. STAMPP, *THE PECULIAR INSTITUTION* 198 (1956). This prohibition was more than an economic measure: it was a means of denigrating the "inferior" race. Consider the 1836 statement of Chief Justice Ruffin of the North Carolina Supreme Court, quoted in 1 H. T. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 77 (2d ed. 1968): slave marriage "can mean only that concubinage . . . with which alone, perhaps, their condition is compatible."

⁴³ See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

"suspect class"⁴⁴—a disadvantaged group deemed to need special judicial protection—or had a significantly adverse impact on "fundamental" rights,⁴⁵ the Court subjected that legislation to a "strict scrutiny" test. In order to pass this test, a state had to show that the enactment in question was narrowly drawn to meet a compelling state interest.⁴⁶ If, on the other hand, neither a suspect class nor a fundamental right was involved, the Court would uphold legislation that was rationally related to the furtherance of a legitimate state interest.⁴⁷ In practice, strict scrutiny virtually assured a finding of unconstitutionality.⁴⁸ Attempts have been made to invoke strict scrutiny in the context of homosexual marriage,⁴⁹ but without success: Homosexuals have not been accorded suspect-class status nor has homosexual marriage been deemed a fundamental right.

1. Homosexual Marriage Is Not a Fundamental Right

The Supreme Court explicitly recognized marriage as a fundamental right in its recent decision in *Zablocki v. Redhail*.⁵⁰ As a result, strict scrutiny is now required whenever a legislative classification substantially infringes the right to marry.⁵¹

Redhail is probably not a useful precedent for the declaration of homosexual marriage as a fundamental right. In the first place, the Court clearly cautioned against sweeping applications of its holding:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regula-

⁴⁴ *E.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971) (aliens are suspect class); *Korematsu v. United States*, 323 U.S. 214 (1944) (racial classifications suspect).

⁴⁵ *E.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right of access to court for divorce); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (right to vote).

⁴⁶ *E.g.*, *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁴⁷ *E.g.*, *McDonald v. Board of Election*, 394 U.S. 802 (1969) (failure to provide for absentee voting by unsentenced inmates); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (regulation of eye examinations); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (restriction on methods for pumping gas and mineral water).

⁴⁸ See Gunther, *supra* note 43, at 8.

⁴⁹ See *Singer v. Hara*, 11 Wash. App. 247, 542 P.2d 1187 (1974).

⁵⁰ 434 U.S. 374 (1978). WIS. STAT. § 245.10 (1973) provided that Wisconsin residents having court-ordered support responsibilities for issue not in their custody could not marry without judicial permission. The Court invalidated this statute because it was not "closely tailored to effectuate" the state interests involved. 434 U.S. at 388.

⁵¹ See *Califano v. Jobst*, 434 U.S. 47 (1977) (minor burden on marriage does not invoke strict scrutiny).

tion which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.⁵²

Secondly, *Redhail's* designation of marriage as a fundamental right referred to the situation of a heterosexual couple: Homosexuals' fundamental right to marry does not automatically follow from the decision. The Supreme Court's determination was grounded on three distinct rationales: (1) the right to bear a child is a mockery without a concomitant right to marry and bear legitimate children;⁵³ (2) the right to marry is part of the fundamental right of privacy implicit in the fourteenth amendment's due process clause;⁵⁴ and (3) "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁵⁵

The first rationale is clearly inapplicable to homosexual couples. Although the second rationale is a relevant consideration, the utility of the privacy argument is limited by the Court's reluctance to extend the right of privacy to sexual preference.⁵⁶ Until the

⁵² *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

⁵³ *Id.*

⁵⁴ *Id.* 384.

⁵⁵ *Id.* 383 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

⁵⁶ The Supreme Court has declined to consider the argument that state sodomy statutes intrude upon homosexuals' personal choice protected by the right to privacy. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (upholding sodomy statute); *Enslin v. Wallford*, 565 F.2d 156 (4th Cir. 1977), *cert. denied*, 436 U.S. 912 (1978) (upholding sodomy statute as applied to homosexuals). The refusal to extend the right of privacy to sexual preference and activity forms a stark contrast to the long line of cases that protect decisions regarding child-rearing, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and contraception, *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The district court in *Commonwealth's Attorney* distinguished these cases on the ground that they concerned marital relations and family life. 403 F. Supp. 1199, 1202 (E.D. Va. 1975). Yet *Eisenstadt*, upholding the single person's right to obtain contraceptives, had rejected the marital/nonmarital dichotomy. Surely, the initial choice of bedmate is as intimate as the decision to avoid contraception.

A few courts have arrived at interpretations of the privacy cases at odds with that of the *Commonwealth's Attorney* court. See *Shuman v. City of Philadelphia*, 470 F. Supp. 449, 459 (E.D. Pa. 1979) ("a party's private sexual activities are within the 'zone of privacy' protected from unwarranted government intrusion"); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (striking down antifornication statute as violation of privacy right). The majority, however, continues to deny protection to nonmarital, consensual sexual activity. See *Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case-Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); *Rivera, supra* note 3, at 952-55.

judiciary protects this choice, it is doubtful that the privacy argument can support the more radical view that a homosexual couple has a right to marry.

Only the third rationale might justify characterizing homosexual marriage as a fundamental right. Nevertheless, the theory that the right to marry is essential to the pursuit of happiness will probably not be applied to homosexuals in view of the conventional notion of marriage as a contract between a man and a woman.⁵⁷ Given the pervasiveness of that traditional definition, along with the circumscribed holding of *Redhail* and the Supreme Court's refusal to approve sexual autonomy for homosexuals, same-sex marriage cannot realistically be regarded as a fundamental right.

2. Homosexuality Is Not a Suspect Classification

The state's police power allows classification of citizens for various purposes, as long as those legislative classifications are "reasonably justified in pursuit of a legitimate interest."⁵⁸ State courts generally allow the legislatures a great deal of latitude in establishing these classifications, but a state is always restricted by both the Supreme Court's and the governing state court's designations of suspect classes. Thus far, only race,⁵⁹ alienage,⁶⁰ and national ancestry⁶¹ have been deemed suspect classifications.

Recent cases involving discrimination based on gender and illegitimacy have enumerated the bases on which a classification will be declared suspect. Five criteria appear to be of controlling importance. The class in question must (1) have suffered a long history of discrimination;⁶² (2) possess a characteristic that bears no relation to ability "to perform or contribute to society";⁶³ (3) be marked by a "badge" of distinction;⁶⁴ (4) be relegated to a position

⁵⁷ See notes 4-24 *supra* & accompanying text.

⁵⁸ Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 821 (1975) [hereinafter cited as *The Lesbian Mother*].

⁵⁹ *McLaughlin v. Florida*, 379 U.S. 184 (1946).

⁶⁰ *Graham v. Richardson*, 403 U.S. 365 (1971).

⁶¹ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶² *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁶³ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 853 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).

⁶⁴ *Mathews v. Lucas*, 427 U.S. 495, 506 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

of political powerlessness;⁶⁵ and (5) possess an immutable characteristic that is either inherent or uncontrollable.⁶⁶ Although homosexuals do not satisfy the criteria to the same degree as those groups declared suspect, they nevertheless possess certain suspect characteristics.

Homosexuals undoubtedly have a long history of discrimination, dating back to Biblical days.⁶⁷ Many courts still sanction such discrimination, especially when the homosexual activity in question is of a blatant and unrestrained nature.⁶⁸

Society's attitude toward homosexuality reflects the irrational impulses motivating most discrimination. There is little evidence that homosexuality is related to the capacity to be a productive member of society. To the contrary, the few studies in this area have found an overall similarity between heterosexuals' and homosexuals' psychic adjustment and job performance.⁶⁹ Some federal agencies have begun tentative reevaluations of discriminatory practices directed at homosexuals.⁷⁰ The numerous departments that retain discriminatory requirements often explain them on the ground that

⁶⁵ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Hobson v. Hansen*, 269 F. Supp. 401, 508 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

⁶⁶ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

⁶⁷ "Thou shalt not lie with mankind, as with womankind; it is abomination." *Leviticus* 18:22. See *Genesis* 19:5; *Leviticus* 20:13; *Romans* 1:26-27; Barrett, *Legal Homophobia and the Christian Church*, 30 *HASTINGS L.J.* 1019 (1979), Chaitin & Lefcourt, *Is Gay Suspect?*, 8 *LINCOLN L. REV.* 24 (1973).

⁶⁸ See *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) (court allowed University of Minnesota to reject avowed homosexual's application for position as librarian); *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (district court held that homosexual teacher's dismissal was justified in view of his extremely controversial behavior, but that homosexuality alone would not normally be a proper basis for discharge; circuit court found public statements protected by the first amendment).

⁶⁹ See A. BELL & M. WEINBERG, *supra* note 26 (social adjustment among homosexuals and heterosexuals similar, although authors found some evidence that female homosexuals changed jobs more frequently than their heterosexual counterparts); A. STORR, *SEXUAL DEVIATION* 34 (1964) (sense of inferiority due to deviancy encourages "striving for excellence"). Cf. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (dismissal improper because plaintiff's homosexuality did not affect job performance); *Aumiller v. University of Del.*, 434 F. Supp. 1273 (D. Del. 1977) (plaintiff's statements on subject of homosexuality did not impede performance of his daily duties).

⁷⁰ The Immigration and Naturalization Service recently issued a temporary directive reversing its long-standing practice of denying admission to foreign visitors suspected of homosexuality. *N.Y. Times*, Aug. 14, 1979, at A-14, col. 1. Additionally, the Civil Service Commission has adopted a new personnel policy that significantly restricts the use of homosexuality as an employment criterion. See *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977) (remanded for reconsideration in light of new employment guidelines); *Aumiller v. University of Del.* 434 F. Supp. 1273 (D. Del. 1977).

homosexual employees give the department a bad name.⁷¹ Thus, discrimination is justified by the existence of prejudice, rather than by job-related distinctions.

Arguably, the discrimination faced by homosexuals has not been as pervasive and burdensome as that afflicting other groups, because homosexuality is not a veritable "badge" of distinction.⁷² Homosexuals who choose to hide their sexual preference can usually avoid discrimination. This lack of visibility is one of the most important distinctions between homosexuals and other groups declared suspect. Nevertheless, those homosexuals who do not wish to live a "closet" existence risk subjecting themselves to professional and social ostracism as soon as they reveal their sexual preferences. Moreover, the obviousness of a distinguishing characteristic is a questionable requirement for designation of suspect classes. As Justice Stevens has noted, a classification based on a personal trait, though "not as apparent to the observer as sex or race," is not "any less odious."⁷³

The issue of homosexuals' political powerlessness is somewhat complex. Undoubtedly, the gay rights movement is gaining strength in certain parts of the country, and its increasing momentum will likely mobilize the homosexual vote.⁷⁴ Additionally, many closet homosexuals have occupied positions of political importance in the past;⁷⁵ in areas with large gay populations, avowed homosexuals are beginning to run for public office,⁷⁶ and some have even been victorious in city elections.⁷⁷

Despite these indications of progress, homosexuals are still relatively powerless as a political group. Many homosexuals still fear a negative reception in the political arena, and the sizable number of individuals and groups who harbor antagonistic feelings toward

⁷¹ See, e.g., *Gaylord v. Tacoma School Dist.*, 88 Wash. 2d 286, 559 P.2d 1340, cert. denied, 434 U.S. 879 (1977) (school teacher's ability to teach impaired by public displays of homosexuality which society regards as immoral). For an extensive discussion of the dubious rationales for discharging homosexuals, see Rivera, *supra* note 3, at 805-74.

⁷² See note 64 *supra*.

⁷³ *Mathews v. Lucas*, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting).

⁷⁴ In the past, local politics has been the main focus of gay activism, with city and state governments as the major targets. The movement is presently developing a more national perspective and directing a larger part of its efforts toward the federal government. The homosexual vote in the immediate future will probably be most influential in urban politics. See P. FISHER, *supra* note 25, at 190, 194.

⁷⁵ C. TRIPP, *supra* note 26, at 201.

⁷⁶ See P. FISHER, *supra* note 25, at 194.

⁷⁷ For example, avowed homosexual Harvey Milk was elected to the San Francisco City Council. He served as city supervisor until his assassination in 1978.

homosexuality suggests that these apprehensions are realistic.⁷⁸ Although Seattle,⁷⁹ San Francisco,⁸⁰ and Berkeley⁸¹ have passed ordinances banning discrimination against homosexuals, the gay rights movement recently suffered political setbacks in New York City⁸² and Miami.⁸³ In Wichita, Kansas,⁸⁴ and Eugene, Oregon,⁸⁵ voters actually repealed antidiscrimination ordinances. Although their political future appears more promising than ever before,⁸⁶ homosexuals have a long way to go before they can be assured of protecting themselves through the political process.

The immutability requirement presents the greatest obstacle to homosexuals' claim to suspect-class status. Although the origin of homosexuality has not been conclusively determined, most experts support a conditioning theory which, while acknowledging that embryonic factors may be predisposing, emphasizes environmental influences.⁸⁷ If homosexuality is not an unalterable accident

⁷⁸ The virulence of anti-gay sentiment can be judged by Proposition Six (the Briggs Initiative), presented to the California electorate in November, 1978. This provision would have required the state and all of its school districts to conduct investigations of any school teacher who, in public or private, advocated or practiced homosexuality. Proposition Six met defeat at the polls. N.Y. Times, Nov. 8, 1978, at 19, col. 3. See also Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687, 702 (1973).

⁷⁹ A nondiscrimination ordinance was passed in Seattle. 1974 FACTS ON FILE 459, col. 3.

⁸⁰ N.Y. Times, Apr. 5, 1978, at 15, col. 1.

⁸¹ *Id.*, Oct. 12, 1978, at 55.

⁸² The 1978 New York City Council resolution to prohibit discrimination in hiring and housing on the basis of sexual preference was defeated by a vote of 6-3. *Id.*, Nov. 9, 1978, at B3, col. 6.

⁸³ Miami voters refused to reenact the Dade County nondiscrimination ordinance that was repealed in 1976 during the Anita Bryant campaign. *Id.*, June 8, 1977, at A1, col. 4.

⁸⁴ *Id.*, May 10, 1978, at A18, col. 1.

⁸⁵ *Id.*, May 24, 1978, at A18, col. 3.

⁸⁶ The most recent promise comes from a bill, which has passed the Connecticut state senate, banning job and housing discrimination against homosexuals. *Id.*, Apr. 5, 1979, at B3, col. 1.

⁸⁷ The 1948 Kinsey report still commands majority support:

The data indicate that the factors leading to homosexual behavior are 1) the basic physiological capacity of every mammal to respond to any sufficient stimulus; 2) the accident which leads an individual into his or her first sexual experience with a person of the same sex; 3) the conditioning effects of such experience; and 4) the indirect but powerful conditioning which the opinions of other persons and the social codes may have on an individual's decision to accept or reject this type of sexual contact.

A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 447 (1953). See Money, *Pubertal Hormones and Homosexuality, Bisexuality, and Heterosexuality* in NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS 77 (1972); *The Lesbian Mother*, *supra* note 58, at 814, 825; *Acanfora v. Board of Educ.*, 359

of birth, then homosexuals do not possess an inherent immutable characteristic.

The judiciary will also regard as immutable an uncontrollable characteristic.⁸⁸ The extent to which homosexuality can be controlled, however, is not clear. Many researchers adhere to the theory that once sexual orientation is established, change is almost impossible.⁸⁹ Nevertheless, several recent studies show that even individuals who have been predominantly or exclusively homosexual for more than five years can change their sexual orientation if they are highly motivated to do so.⁹⁰ In light of these studies, homosexuality cannot be regarded as a condition that is always beyond the individual's control. Thus, for purposes of determining whether homosexuality is a suspect classification, it appears that sexual preference cannot be viewed as immutable. The question is, however, very close.

Although homosexuals have long been subject to discrimination, are still politically weak, and possess a characteristic that bears no relation to their social productivity, homosexuality is not as visible or as immutable as the characteristics of the traditional suspect classes: race, alienage, and national ancestry. This analysis justifies the judiciary's reluctance to designate homosexuals a suspect class.⁹¹ In view of this conclusion and the determination that homosexual marriage is not a fundamental right, legislation that operates to the detriment of homosexuals does not warrant the application of strict scrutiny.

F. Supp. 843, 849 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

⁸⁸ See note 66 *supra* & accompanying text.

⁸⁹ Many studies have indicated that the possibility of changing homosexuals to heterosexuals is at best marginal. NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 5 (1969). See also COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT 26, 66 (1957); A. KARLEN, SEXUALITY AND HOMOSEXUALITY 572-606 (1971); C. TRIPP, WHO IS A HOMOSEXUAL? 11 (1965).

⁹⁰ See Pomeroy, *Homosexuality*, in THE SAME SEX, *supra* note 27, at 7-9; W. MASTERS and V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 401-02 (1979) (in treatments aimed at changing homosexual orientation, authors experienced 65% success rate, attributed, in part, to careful screening for highly motivated subjects).

⁹¹ To date, only one federal district court has suggested that homosexuals are a suspect class. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). That court relied heavily on the Supreme Court's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which four Justices declared women a suspect class. *Id.* 688. Although the *Acanfora* court noted that the suspect status of gender classifications need not imply that "sexual preference" is similarly suspect, the court recommended such an extension of the plurality opinion in *Frontiero*. *Acanfora*, 359 F. Supp. at 852.

3. The "Heightened Rationality" Test for Discrimination Against Homosexuals

Although strict scrutiny may not be invoked on behalf of homosexuals, it need not follow that legislative classifications based on sexual preference must be judged by the old "mere rationality" standard.⁹² Recent Supreme Court decisions have articulated an intermediate level of scrutiny, which may be termed the "heightened rationality test."⁹³ This "more modest interventionism"⁹⁴ has been applied to a variety of statutory schemes in place of the lower-level rational basis standard.⁹⁵

One formulation of the middle-tier test is applied to gender-based classes. Such classifications "must serve *important* governmental objectives and must be substantially related to achievement of those objectives."⁹⁶ On the other hand, middle-level scrutiny, when applied to discrimination against illegitimates, requires that the legislative classification be "substantially related to *permissible* state interests."⁹⁷ This "means-oriented inquiry" is attractive because it permits courts to protect individual rights and yet provides a narrow standard which avoids "court confrontations with broader value choices."⁹⁸ Middle-level scrutiny thus seeks to cope with the problem "that there remain rights, not now classified as 'fundamental,' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect,' that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members."⁹⁹

⁹² See note 47 *supra* & accompanying text.

⁹³ Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) (characterizing level of scrutiny as "middle-tier"); Reed v. Reed, 404 U.S. 71 (1971) (*locus classicus* of middle-level test). See Note, Kahn v. Shevin and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?, 32 WASH. & LEE L. REV. 275 (1975) [hereinafter cited as "Heightened Rationality"].

⁹⁴ Gunther, *supra* note 43, at 21.

⁹⁵ See "Heightened Rationality," *supra* note 93, at 278.

⁹⁶ Craig v. Boren, 429 U.S. 190, 197 (1976) (test applied to gender-based classification) (emphasis added). See Gunther, *supra* note 43, at 47.

⁹⁷ Lalli v. Lalli, 439 U.S. 259, 265 (1978) (emphasis added). See Trimble v. Gordon, 430 U.S. 762, 767 (1977); Mathews v. Lucas, 427 U.S. 495, 510 (1976).

⁹⁸ Gunther, *supra* note 43, at 24.

⁹⁹ Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (urging application of middle-level scrutiny to old-age classifications).

The "heightened rationality" test has also been applied by many lower federal courts. E.g., Cohn v. G.D. Searle & Co., 447 F. Supp. 903 (D.N.J. 1978); Moss v. Secretary of HEW, 408 F. Supp. 403 (M.D. Fla. 1976); Samuel v. University of Pitt., 375 F. Supp. 1119 (W.D. Pa. 1974), *rev'd on other grounds*, 538 F.2d 991

The classifications tested by middle-level scrutiny are, like gender¹⁰⁰ and illegitimacy,¹⁰¹ based on immutable personal characteristics that, in general, lack a substantial relationship to articulated, legislative purposes.¹⁰² Thus, the intermediate level of

(3d Cir. 1976); *Gay Students Org. v. Bonner*, 367 F. Supp. 1088 (D.N.H.), *aff'd as modified*, 509 F.2d 652 (1st Cir. 1974); *Bowen v. Hackett*, 361 F. Supp. 854 (D.R.I. 1973).

¹⁰⁰ Occasionally the Court upholds a gender-based classification on the ground that it has a fair and substantial relation to the legislative purpose. *E.g.*, *Schlesinger v. Ballard*, 419 U.S. 498, 508-09 (1975) (upholding federal statute that allowed male and female naval officers to remain in the service for different amounts of time before being discharged for want of promotion); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding Florida statute that granted widows but not widowers \$500.00 annual property tax exemption).

More typically, however, gender-based distinctions have been invalidated. *E.g.*, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (federal statute unconstitutional because it conditioned survivors' benefits for widowers, but not widows, on proof of receipt of at least one-half of their support from deceased spouses); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18); *Stanton v. Stanton*, 421 U.S. 7 (1975) (invalidating Utah child support statute that provided that the period of minority extends to age 21 for males, to age 18 for females); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (federal statute unconstitutional because it denied insurance benefits to surviving widowers with children in their care while authorizing such benefits for similarly-situated widows); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating federal statutes that, solely for administrative convenience, designated spouses of male members of the uniformed services as dependents eligible for benefits, but required spouses of female members to prove dependency for over one-half of their support); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating Idaho Probate Code provision that gave preference to men over women for appointment as administrators of decedents' estates). See Note, *Constitutional Law—Gender Classifications and the Equal Protection Clause—the New Standard*, 42 Mo. L. Rev. 470 (1977).

¹⁰¹ *E.g.*, *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding New York intestacy statute that allows inheritance by illegitimate issue only when paternity order has issued during father's lifetime); *Trimble v. Gordon*, 430 U.S. 762 (1977) (invalidating Illinois statute that discriminated against illegitimate children); *Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding section of Social Security Act that distinguished between unacknowledged illegitimate children and all others).

For an example of middle-level scrutiny masquerading as "mere rationality," see *Eisenstadt v. Baird*, 405 U.S. 438 (1971) (citing test articulated in *Reed v. Reed*, 404 U.S. 71 (1971), court invalidated Massachusetts statute that "irrationally" accorded different treatment to married and unmarried individuals).

Although some Justices have argued that gender and illegitimacy should be suspect classes, the majority have been content to apply a level of scrutiny with more bite than the rational-basis test. For example, in *Mathews v. Lucas*, 427 U.S. 495 (1976), the Court conceded that illegitimacy is an immutable characteristic that bears no relation to the individual's ability to participate in society, but refused to designate illegitimacy a suspect class. The Court reasoned that illegitimacy is not an obvious badge of distinction and that "the discrimination against illegitimates has never approached the severity" of the discrimination against other groups. *Id.* 506. Similarly, although a plurality of the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), declared sex a suspect class, the majority has never endorsed application of strict scrutiny to gender-based distinctions.

¹⁰² One commentator has suggested that any classification based on personal characteristics or status should be subject to the intermediate level of scrutiny. Nowak, *Realigning the Standards of Review Under the Equal Protection Guar-*

scrutiny is appropriate for classes that come close to meeting the traditional indicia of suspectness.

Homosexuals stand in need of the judicial protection offered by the "heightened rationality" test and very nearly meet the requirements of the suspect class.¹⁰³ Sexual preference, like gender and illegitimacy, is a characteristic that does not impair an individual's ability to contribute to society. Like women and illegitimates, homosexuals have been and, in some regions, continue to be subject to *de jure* discrimination and violent prejudice.¹⁰⁴ Homosexuals, like women, have just begun to gather together as a political force.¹⁰⁵ Although homosexuality is not as obvious as gender,¹⁰⁶ this distinction should not prevent homosexuals from receiving the benefit of middle-level scrutiny. The comparison with illegitimates is telling—neither characteristic need be known until revealed by the individual or an investigation.

In one respect, homosexuals differ from women and illegitimate offspring. New research indicates some possibility of changing sexual orientation if the patient is highly motivated.¹⁰⁷ The statistics reported in most studies, however, are not promising.¹⁰⁸ Even the Masters and Johnson researchers, working with carefully selected and highly motivated subjects, failed to bring about the desired change in over a third of their patients.¹⁰⁹ Only those homosexuals who are wealthy and eager enough to obtain the best treatment can hope to alter their sexual preference.

Judicial solicitude for homosexuals should not be withheld because the characteristic is mutable in a few: middle-level scrutiny should be applied to legislative classifications based on sexual preference.¹¹⁰

ante—*Prohibited, Neutral, and Permissive Classifications*, 62 Geo. L.J. 1071, 1082 (1974).

¹⁰³ See notes 67-90 *supra* & accompanying text.

¹⁰⁴ See notes 78-86 *supra* & accompanying text.

¹⁰⁵ See notes 74-77 *supra* & accompanying text.

¹⁰⁶ See notes 72-73 *supra* & accompanying text.

¹⁰⁷ See notes 87-90 *supra* & accompanying text.

¹⁰⁸ See NATIONAL INSTITUTE OF MENTAL HEALTH, *supra* note 89 (twenty percent chance of achieving some heterosexual interest in sufficiently motivated patients); J. Frank, *Treatment of Homosexuals* in NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS 67 (1972) (ten to twenty percent chance of change for motivated patients).

¹⁰⁹ W. MASTERS & V. JOHNSON, *supra* note 90, at 401-02.

¹¹⁰ In *Singer v. Hara*, 11 Wash. App. 247, 262-63 n.13, 522 P.2d 1187, 1198 n.13 (1974), the court recognized that recent Supreme Court equal protection decisions utilize an intermediate level of scrutiny, but refused the petitioners' request to apply this standard of review.

C. State Interests Behind the Ban on Homosexual Marriage

The "heightened rationality" analysis examines whether classifications can be justified by legitimate state interests. Before applying this test to the denial of homosexuals' right to marry, the nature of the harm visited upon homosexual couples by such a prohibition should be re-emphasized. Homosexual couples who have made long-term commitments to their mates, though similarly situated to committed heterosexual couples,¹¹¹ are deprived of tax, property, social security, and other financial benefits conferred upon married heterosexuals.¹¹² Moreover, prohibiting homosexual marriage denies same-sex pairs the opportunity afforded heterosexual couples to reap the psychological benefits of marriage.

State prohibition of homosexual marriage will survive the "heightened rationality" test only if it is shown to be substantially related to a permissible state interest.¹¹³ Prohibiting homosexual marriage has frequently been justified by several perceived needs: (1) to foster a "cure" for and prevent an increase of homosexuality; (2) to support state sodomy laws; and (3) to ensure family stability and procreation.¹¹⁴ For each of these objectives, either the state interest itself is not legitimate or the relationship between that interest and prohibition of homosexual marriage is too attenuated to validate the classification.

¹¹¹ See notes 25-31 *supra* & accompanying text.

¹¹² See notes 32-41 *supra* & accompanying text.

¹¹³ This Comment chooses, for analytic purposes, the less stringent version of the "heightened rationality" test and therefore requires only a "permissible" state interest rather than an "important" one. See notes 96-97 *supra* & accompanying text.

In illegitimacy cases, the Supreme Court has restricted the defendant state to arguments based upon objectives actually contemplated by the legislature that passed the challenged statute. *E.g.*, *Mathews v. Lucas*, 427 U.S. 495, 508 n.14 (1976). See Gunther, *supra* note 43, at 46 (The judiciary must "assess the rationality of the means in terms of the state's purposes rather than hypothesizing conceivable justifications on its own initiative.") (emphasis in original).

Legislation grounded upon stereotypes or "'archaic and overbroad' generalizations" will not pass muster. *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)). See *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Most state marriage statutes do not mention homosexuality. A legislative intent to exclude them is inferred by reviewing courts on the basis of "traditional" notions of marriage. The courts also supply justifications for restriction of the right to marry. See notes 4-24 *supra* & accompanying text. Although these judicially advanced state interests are arguably irrelevant, this Comment will accept the state courts' idea of state interests because they represent an authoritative local source.

¹¹⁴ See Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1243 (1974); *The Legality of Homosexual Marriage*, *supra* note 21, at 580-82.

A justification for state prohibition of homosexual marriage that focuses on "curing" homosexuality is untenable. Homosexuality is no longer viewed as a "disease" requiring a "cure."¹¹⁵ The conclusions of the Kinsey investigators were largely responsible for reconsideration of the nature of homosexuality as "a natural variation of sexual expression," rather than a pathological condition.¹¹⁶ Official support for this view came from the Surgeon General of the Public Health Service in August, 1979, when he announced that "current and generally accepted canons of medical practice with respect to homosexuality" indicate that it should "no longer be considered a mental disease or defect" for purposes of the immigration laws.¹¹⁷

Assuming that the state might legitimately wish to discourage a practice that is not a disease, there is little or no reason to believe that withholding marital status will lessen the incidence of homosexuality. Many psychologists report that sexual preference is determined in early childhood,¹¹⁸ long before the influence of legal codes and norms reaches the consciousness. Even if homosexuality is regarded as an individual choice, the experience of countries that have adopted liberal moral codes indicates that legalizing homosexuality has no discernible effect on the number of homosexuals in the population.¹¹⁹ The goal of "curing" or discouraging homosexuality, therefore, is not substantially furthered by prohibiting same-sex marriage.

The argument that prohibition of homosexual marriage supports sodomy laws is irrelevant to the twenty-three states that have repealed these statutes.¹²⁰ Although other states may still cite their sodomy laws as support for restrictions on marriage, the validity and wisdom of applying sodomy laws to consensual homosexual behavior

¹¹⁵ In December, 1973, the American Psychiatric Association voted to remove homosexuality from its official list of mental disorders. Press Release of American Psychiatric Association, Resolution on Homosexuality (Dec. 15, 1973). See also A. BELL & M. WEINBERG, *supra* note 26, at 196-97.

¹¹⁶ A. BELL & M. WEINBERG, *supra* note 26, at 196.

¹¹⁷ N.Y. Times, Aug. 12, 1979, at 20, col. 1.

¹¹⁸ Chaitin & Lefcourt, *supra* note 67, at 38; Acanfora v. Board of Educ., 359 F. Supp. 843, 847-48 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (expert testimony that sexuality is determined by age five or six).

¹¹⁹ See The Legality of Homosexual Marriage, *supra* note 21, at 581 n.39 (collecting authorities).

¹²⁰ According to the National Gay Task Force in New York City, 23 states had repealed their sodomy laws as of August, 1979: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wyoming.

are questionable.¹²¹ Some lower federal courts have deemed these laws to be of slight importance because they are so rarely enforced and because substantial intrusion on individual privacy would result from greater enforcement efforts.¹²² When sodomy laws are invoked, it is usually in a capricious fashion, creating a disproportionate harm to those arrested and prosecuted.¹²³

The foregoing considerations call into question the constitutionality of prosecuting homosexuals under state sodomy laws. In fact, unfairness in the administration of sodomy statutes, combined with the long line of cases protecting the physical autonomy of heterosexuals,¹²⁴ compels the conclusion that state restrictions on private, consensual sexual activity are unconstitutional, notwithstanding the Supreme Court's refusal to hear argument on the issue.¹²⁵ Sodomy statutes thus cannot provide the justification for prohibition of homosexual marriage.

Although the state has a legitimate interest in protecting the family unit,¹²⁶ prohibiting homosexual marriage does not further that interest. Research¹²⁷ and the experience of other countries¹²⁸ show that homosexuals compose a relatively small and stable percentage of the population. Consequently, the theory that permitting homosexual marriage would significantly threaten human reproduction is highly questionable. Moreover, the view that marriage "exists as a protected legal institution primarily because of societal values associated with the propagation of the human race"¹²⁹ is gradually losing its foothold in our society. An increasing number of heterosexual couples are choosing to marry, but declining to raise families.

¹²¹ The Model Penal Code proposed by the American Law Institute recommends that only sexual practices involving force, minors, or public acts be subject to criminal punishment. MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1955). Additionally, in 1969 the National Institute of Mental Health urged that all private sexual acts between consenting adults be legalized. See *The Lesbian Mother*, *supra* note 58, at 814.

¹²² See *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 852 (D. Md., 1973), *aff'd without reaching constitutional issue*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); *In re Labady*, 326 F. Supp. 924, 929 (S.D.N.Y. 1971).

¹²³ See *The Legality of Homosexual Marriage*, *supra* note 21, at 581 n.42.

¹²⁴ See note 56 *supra*.

¹²⁵ *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). See note 56 *supra*.

¹²⁶ See *Estin v. Estin*, 334 U.S. 541, 546 (1948).

¹²⁷ An estimated four percent of the adult, white male population of the United States is exclusively homosexual. A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650-51 (1948). See also *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 849 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); C. TRIPP, *supra* note 26; *The Legality of Homosexual Marriage*, *supra* note 21, at 581 & n.39.

¹²⁸ See note 119 *supra* & accompanying text.

¹²⁹ *Singer v. Hara*, 11 Wash. App. 247, 259, 522 P.2d 1187, 1195 (1974).

In sum, prohibition of homosexual marriage is not an effective means of advancing any legitimate state interest. Homosexual couples should therefore be afforded the opportunity to obtain the legal status and marital benefits to which they are entitled.

V. QUASI-MARITAL STATUS: A MEANS OF AFFORDING HOMOSEXUALS MARITAL BENEFITS AND LEGAL STATUS

A. *The Mechanics*

Judicial recognition that current marriage restrictions violate the equal protection clause does not end the inquiry; the problem of effecting a remedy remains. In the belief that the solution should emanate from state authorities rather than federal courts, this Comment offers a legislative proposal to equalize the situations of homo- and heterosexual couples.

An enactment offering homosexuals quasi-marital status would make available the marital benefits and legal status that same-sex couples are presently denied.¹³⁰ The only legal difference between marriage and quasi-marital status is that the former would continue to be a heterosexual institution, whereas the latter would create an option exclusively for homosexual couples.

The legal unions of homosexual couples would be solemnized in the same way as are heterosexual marriages. The duly licensed homosexual couple could go to a justice of the peace, who would be authorized by statute to perform these ceremonies, or to an appropriate minister. Divorce proceedings for homosexuals would also be handled in the same fashion as heterosexual divorces. Courts would have to become involved in adjudicating homosexual dissolution proceedings in order to protect the financially weaker partner.

Through quasi-marital status, homosexuals could obtain the financial benefits—provided for example, by tax, social welfare, and intestacy laws—now afforded married, heterosexual couples.¹³¹ Similarly, the option of quasi-marital status would enable same-sex couples to reap the psychological benefits of a legally sanctioned relationship.¹³² Quasi-marriage thus recognizes that homosexuals have the same emotional needs as heterosexuals. In this respect, the proposal comports with the widely held view of homosexuality

¹³⁰ Quasi-marital status was first proposed in J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 9 n.1 (1965). See also *The Legality of Homosexual Marriage*, *supra* note 21, at 588-89. The details of the plan offered here, however, are original.

¹³¹ See notes 32-41 *supra* & accompanying text.

¹³² See note 42 *supra* & accompanying text.

as an alternative form of sexual expression, rather than a pathological condition.¹³³

B. *Adoption Under the Quasi-Marital Status Proposal*

The proposal for quasi-marital status raises the obvious issue of adoption privileges. Under the intermediate level of scrutiny, state prohibition of homosexual marriage cannot be justified because it does not sufficiently support legitimate state concerns.¹³⁴ Middle-tier analysis of adoption restrictions based on sexual preference yields a different conclusion. This section demonstrates that the "heightened rationality" test does not compel unconditional adoption privileges for homosexual couples and outlines the appropriate treatment of adoption under the quasi-marital status proposal.

The best interest of the child is the overriding concern when courts make custody decisions.¹³⁵ Moreover, the state does have a legitimate interest in safeguarding children.¹³⁶ Equal protection analysis under the "heightened rationality" test will therefore tolerate limitations on the adoption privileges of homosexual couples if such restriction aids significantly in protecting the best interests of candidates for adoption.

The strong anti-homosexual feelings harbored by many Americans will not disappear overnight, even if homosexuals are afforded quasi-marital status. All too often children adopt their parents' irrational prejudices.¹³⁷ Children growing up in homosexual en-

¹³³ See notes 115-17 *supra* & accompanying text.

¹³⁴ See notes 113-29 *supra* & accompanying text.

¹³⁵ State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973); Rickard v. Rickard, 7 Wash. App. 907, 503 P.2d 763 (1973); 1 PA. CONS. STAT. ANN. § 502 (Purdon Supp. 1964-78) (issuance of adoption decree requires finding that "the welfare of the person proposed to be adopted will be promoted by such adoption").

Some courts have declared that a homosexual relationship creates an improper environment for a child, *In re Jane B.*, 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976), while other courts have awarded custody to homosexuals with the stipulation that they confine their contacts with their lovers to delineated circumstances. *Mitchell v. Mitchell*, No. 240665 (Super. Ct., Santa Clara County, Cal., June 8, 1972); see *The Lesbian Mother*, *supra* note 58, at 816. Only a few courts have maintained that the existence of a homosexual relationship does not automatically render a home unfit for children. *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973); *M.P. v. S.P.*, No. A-989-77 (Super. Ct., N.J., July 23, 1979); *Hall v. Hall*, No. 55900 (C.P., Locking County, Ohio, June, 1974); *Isaacson v. Isaacson*, No. D-36867 (Super. Ct., King County, Wash., Sep. 3, 1974); *Schuster v. Schuster*, No. D-36868 (Super. Ct., King County, Wash., Sep. 3, 1974).

¹³⁶ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

¹³⁷ Although there appear to be no studies on the prevalence of such ridicule, psychologists agree that children mirror their parents' attitudes. G. ALLPORT, *THE NATURE OF PREJUDICE* 276-81 (2d ed. 1958).

vironments frequently incur a great deal of ridicule from their peers. A legislature may legitimately find that, absent a biological relationship to one member of the homosexual union, children ordinarily should not suffer such needless emotional trauma. To balance the interests of children and those of quasi-married couples, the state might adopt a presumption against adoption by homosexuals, but allow an individual couple to rebut the presumption by showing that they can raise the child in a tolerant community.¹³⁸

In addition, adoption should always be permitted when the child is mature enough to decide rationally that he wishes to live with the homosexual couple seeking to adopt. Designating an age of reason and maturity is problematic because children of the same age differ in understanding. Yet many states have statutory provisions or common law rules allowing children of a certain age to contribute to decisions regarding placement or custody.¹³⁹ Similar provisions could be enacted for cases of homosexual adoption. Orphanages and adoption agencies would usually make the final determination of adoptive parents' suitability.¹⁴⁰ A homosexual couple should, however, have recourse to the courts to ensure equitable treatment.

CONCLUSION

Would the quasi-marital status proposal satisfy the gay community? The answer probably depends upon the individual and his or her primary reason for wishing to marry. Those homosexuals seeking the financial benefits and legal status of marriage should

¹³⁸ This proposal resembles current treatment of biracial adoption. Agencies and experts question the wisdom of depriving a child of racial identity by placing him with parents of a different race. Henry, *Whites Find Black-Baby Adoption Harder*, N.Y. Times, Aug. 21, 1979, at B3, col. 4. Equal protection considerations, however, have caused courts to reject statutes that make race the determinative factor in adoption proceedings. *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972); *In re Adoption of Gomez*, 424 S.W.2d 656 (Tex. Ct. App. 1967). Instead, racial considerations are regarded as relevant, but not controlling. In dealing with the similar problem of custody when the mother's second husband was of a different race, the Pennsylvania Supreme Court refused to deny her claim unless specific danger of severe prejudice was shown. *Commonwealth ex rel. Lucas v. Kreisher*, 450 Pa. 352, 299 A.2d 243 (1973).

Giving homosexuals an opportunity to adopt cannot be denied on the ground that the children's sexual preference will be dictated by that of their adoptive parents. A recent study indicates that youngsters being raised by lesbian mothers and their lovers "appear to be traveling the normal path of boy-girl heterosexuality." *Lesbian Offspring Called Normal*, Newark Star-Ledger, Apr. 2, 1978, at 52. See notes 118-19 *supra* & accompanying text.

¹³⁹ E.g., OHIO REV. CODE ANN. §§ 3107.06(E), 3109.04 (Page Supp. 1978) (age twelve). A one-year trial period before entry of the final adoption decree might provide additional protection for the child.

¹⁴⁰ E.g., *id.* § 3107.06(C).

be pleased with quasi-marital status. Other homosexual couples interested in adoption might find the special regulations offensive. The proposed scheme is not a panacea. In addition to varied public responses, many potential administrative problems are sure to arise. Nevertheless, creativity and experimentation are necessary to resolve the conflict between constitutional imperatives and deep-rooted American prejudices. A feasible and equitable resolution could take the form of a legislative enactment that would afford homosexual couples the same financial benefits and legal status as married heterosexual couples.